No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, *et al.*,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The National Coalition Against Censorship ("NCAC" or "Coalition") is an alliance of more than 50 national non-profit organizations that includes literary, artistic, religious, educational, professional, labor, and civil liberties groups.[2] Founded in 1974, the NCAC has educated thousands of artists, authors, teachers, students, librarians, readers, museum-goers and others around the country about the dangers of censorship and how to oppose it by providing advice and information. The NCAC's quarterly newsletter, *Censorship News*, currently reaches 32,000 readers in hard copy and many more online. The NCAC provides information packs on a wide range of free expression issues, as well as assistance responding to censorship.

The NCAC has a particularly strong interest in voicing its opinion where, as here, students' free speech is at stake. Indeed, the NCAC is committed to supporting both teachers and students in their struggle for free speech. For example, the NCAC recently aided a teacher in Rhode Island whose

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *amici curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amici briefs in this case, in letters of consent filed with the Clerk of this Court.

[2] Among NCAC's 52 members are the American Association of University Professors, American Civil Liberties Union, American Federation of Television & Radio Artists, American Society of Journalists & Authors, Association of American Publishers, Children's Literature Association, National Education Association, and the Screen Actors Guild. The views presented in this brief, however, are those of the NCAC alone and do not necessarily represent the individual views of any of its members.

school principal demanded rationales for teaching "controversial" books. The NCAC also assisted a group of high-school students from Long Island whose school library canceled a subscription to a teen magazine (*Seventeen*) after some parents complained about the frank advice in its health and body columns.

The American Booksellers Foundation for Free Expression ("ABFFE") is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech. ABFFE is actively involved in opposing censorship of student expression. Its membership includes nearly a thousand booksellers from around the country, many of whom lead the fight against censorship in their local schools and communities.

The NCAC and ABFFE submit this brief as *amici curiae* because they are concerned about the rising number of incidents of censorship of student speech due in part to misapprehension or misapplication of this Court's precedents and, in particular, due to an unduly broad reading of *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Fraser*"). School administrators, like the district court in this case, have read isolated phrases in *Fraser* as authorizing school officials' censorship of any message they deem contrary to their undefined, unreviewable notion of the "educational mission of the school."

For example, a nine year-old boy in Bedford County, Virginia was asked to remove from his book bag a "North-for-Senate" bumper sticker and a pin opposing the Clinton-Gore presidential ticket. The school also confiscated from the student a Rush Limbaugh newsletter and book he was reading during recreational reading time. *See* Jamie C. Ruff,

Bedford, Pupil Settle Suit Over Limbaugh Book, RICHMOND TIMES DISPATCH, Aug. 13, 1997, at A1. A seventeen-year-old student in Brooklyn was pulled out of class, searched, and told she could not wear a t-shirt and pin that showed the Palestinian flag, or display pro-Palestinian stickers, although the school later reversed its decision. *See* Darcia Harris Bowman, *Principals Walk Fine Line on Free Speech*, EDUC. WEEK, Mar. 19, 2003, at 1. A senior at Bay City Central High School in Michigan was suspended for five days for wearing a t-shirt with the anarchy symbol printed on the front. The student had also previously been either suspended or forced to remove shirts displaying peace signs, upside-down American flags, and an anti-war quote from Albert Einstein. It was only after the student enlisted the help of the local ACLU that his suspension was set aside. *See* Press Release, ACLU, Michigan School Reverses Student's Suspension For Wearing "Anarchy" T-Shirt (May 10, 2004), *available at* http://www.aclu.org/studentsrights/expression/12846prs20040510.html. In April 2006 in Richmond, Virginia, two elementary school students, aged 5 and 8, were kept from class for wearing t-shirts bearing the message "Latinos Forever." *See* Press Release, ACLU, ACLU of Virginia Seeks Guarantee of Student Free Speech in Prince William Schools (Apr. 24, 2006), *available at* http://www.aclu.org/studentsrights/expression/25325prs20060424.html.[3]

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[3] *See also, e.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 466, 469-71 (6th Cir. 2000) (upholding under *Fraser* the prohibition of a Marilyn Manson t-shirt, despite lack of evidence of potential disruption, and despite fact that Slayer and Megadeath shirts were allowed, as were backpacks with Marilyn Manson patches, on grounds that shirt was "offensive" because the band "promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school"); *Chandler v. McMinnville Sch.*

(cont'd)

In the cases cited here, as well as in countless others around the country – cases that remain unreported and unnoticed by the public at large – school officials censor student speech simply because they consider the student's message inappropriate or contrary to the administrator's view of the school's mission. While *amici* do not address the qualified immunity issue in this case, they submit this brief to caution the Court about expanding the ruling in *Fraser* in a manner that would allow school officials such broad, undefined authority. *Amici* also urge the Court to resist expanding the applicability of its school speech jurisprudence to speech that occurs off school premises and that happens to be made by a student. It is a fundamental precept of our democracy that speech perceived to be bad or harmful is to be counteracted with more speech, not by official censorship. Nowhere is this principle more critical than in our nation's public schools, where young people learn by example and are taught to engage in active, reasoned decision-making rather than to become passive recipients of enforced thinking.

SUMMARY OF ARGUMENT

Petitioners ask this Court to apply its student speech precedents to a setting where the Court has never yet applied them: off-campus or, as *Tinker* so famously characterized it, beyond the "schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Petitioners

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Dist., 978 F.2d 524, 530 (9th Cir. 1992) (reversing a district court holding that school was entitled to prohibit "scab" buttons during teacher strike because under *Fraser*, school had the right to decide that buttons were "inherently disruptive"); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796 (D. Idaho 1987) (upholding under *Fraser* the suspension of student who wore a t-shirt parodying school administrators drinking alcohol on school property, noting that t-shirt was "clearly offensive" and "clearly" falling under *Fraser*).

attempt to present this case as yet another student-speech case, but the student here was an 18-year-old adult who stood on a public street holding a banner during a public event with the intent to have the banner broadcast on television. He had not yet arrived at school or on school premises that day, and in fact was later disciplined for truancy. He stood with members of the public as well as students on the street where a public event, the Olympic torch relay, was occurring during school hours.

In none of its prior precedents has this Court extended the authority of school officials beyond school premises. This case is not the occasion for the Court to do so. The record on which the district court granted summary judgment to the school officials does not support the finding that the watching of the Olympic torch relay, by Respondent or by any other student, was part of a school-sponsored event. At most, the school sanctioned a "free period" in which students were allowed to watch the torch relay during school hours if they so chose. Some teachers dismissed classes in order to allow students to watch the relay, but there is no record evidence that the students whose classes were so dismissed were required to watch the relay, that they stood together as a class under supervision of their teacher, or that they were required to stay on school grounds. Nor is there evidence that watching the Olympic relay was connected in any way to a curricular subject or activity of the school.

To the contrary, the record supports that the dismissed students were not required to watch the relay, and were simply told to come back to the next class period at a particular time. Many students in fact left school premises before the relay passed, and were not stopped from leaving by school officials. According to the school's teachers, the students who did watch the relay were not required to remain together as a group, and the teachers were only interspersed with the students. Any suggestion that they were under the

active supervision of their teachers is belied by the record evidence that prior to Frederick's unfurling of the banner, there were several students who were throwing snowballs and *beverage bottles* at one another, without any record support that teachers sought to control the unruly and dangerous behavior or to discipline students for it thereafter.

The court below was therefore correct in vacating and remanding the district court's grant of summary judgment to school officials. Rather than analyzing school officials' conduct with respect to Respondent's speech under the student-speech precedents, however, the court below should have concluded that Respondent's speech was not on school premises or otherwise subject to school officials' discipline or supervision. At a minimum, before concluding that Respondent's or other students' watching of the relay was part of a school-sponsored event, the court below should have vacated and remanded to the district court for purposes of further amplifying the record with regard to the level of school supervision and other undeveloped factual issues.

Even if the school officials' actions with regard to disciplining Respondent's speech is ultimately properly construed under this Court's student-speech precedents, the First Amendment analysis of the decision below should be affirmed. It is undisputed that Frederick's speech caused no material disruption to classroom work, to school activities or to the rights of others in school. The Court should reject Petitioners' and the Government's dangerous invitation to read *Fraser* and its other student-speech precedents broadly so as to allow school officials to prohibit student speech simply because such speech may undermine, or may be inconsistent with, the school's educational mission or the school's own message. Such a broad reading would invert the basic principles of this Court's student-speech cases, and would make student free speech, rather than school censorship, the exception. Such a reading would give to

school officials. While school officials have inherent authority to promote particular messages through their own speech and through school-sponsored student speech, they do not possess broad license to censor discordant messages by individual students.

This is not a case about illegal drugs or about the public schools' laudable efforts to reduce illegal drug use among American teenagers. *Amici curiae* share Petitioners' and the Government's commitment to promoting the health and well-being of our nation's youth by discouraging illegal drug use, including through the school officials' own speech. But this is a case about student speech – and specifically whether suppression of disfavored messages concerning illegal drug use is an effective, or constitutionally permissible, means of achieving shared ends. Nothing in the Safe and Drug Free Schools and Community Act suggests that the goal of drug-free schools should (or would effectively) be promoted by limitations on student speech. Indeed, in our society, we have long adhered to the fundamental principle that the way to counteract bad speech is through more speech, not suppression. *Amici curiae* urge the Court to reinforce that critical message for our nation's youth, thereby encouraging them to develop the critical faculties necessary for reasoned decision-making in our democratic society and for strong, sustained life choices.

ARGUMENT

I. SCHOOL OFFICIALS' DISCIPLINE OF RESPONDENT'S SPEECH SHOULD BE ANALYZED UNDER ORDINARY FIRST AMENDMENT PRINCIPLES, AND NOT PURSUANT TO THIS COURT'S STUDENT-SPEECH PRECEDENTS.

Although the court below correctly vacated and remanded the grant of summary judgment in favor of school officials, it

incorrectly analyzed the case as a student-speech case. The court assumed that Respondent's speech here was subject to discipline by school officials pursuant to even the most speech-protective of the Court's *Tinker-Fraser-Hazelwood* trilogy of student-speech cases. But because Respondent's speech occurred off-campus, it should have been analyzed as speech entitled to full First Amendment protection outside of the "special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Just as it now "can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.*, it is equally beyond dispute that students are not limited in the full measure of their rights as citizens when outside of the schoolhouse gate.

On the basis of the summary judgment record now before it, the Court should not, for the first time, articulate a standard by which school officials may discipline an individual's off-campus speech simply because he or she happened to be a student at the time and the expression took place during school hours. At a minimum, the Court should order the case remanded to the district court for further development of record facts relating to the school officials' claim of authority over Respondent for the off-campus speech at issue here.

A. Respondent's Speech Occurred Off-Campus And Outside The Setting Of A School-Sponsored Activity.

It is undisputed that Frederick was off-campus at the time he displayed his message. He "was standing on or near a public sidewalk across the street from the high school." Pet. App. 63a. He "purposely avoided the high school grounds itself. [He] wanted to be on a public sidewalk but not on school grounds." J.A. 29. Frederick "never made it to school that morning." Pet. App. 2a. The Superintendent accused

Frederick of "failing to join his class or otherwise reporting to the office." Pet. App. 64a. But if Frederick was guilty of truancy for not joining his classmates, it cannot also be argued that he otherwise subjected himself to the school's jurisdiction while remaining off-campus. Frederick did not report himself to the office, because he was not going to school yet. Thus, according to both Frederick's intentions and the Superintendent's interpretation of the facts, Frederick was not at school at the time he unfurled his banner.

That "Frederick was a student, and school was in session," Pet. App. 6a, does not automatically mean that he was subject to the more stringent regulation of his First Amendment free speech guarantees by school officials. The court of appeals suggests the example of a "student driving a car on public streets with a 'Bong Hits 4 Jesus' bumper sticker." Pet. App. 5a. The court recognized that that scenario would be a clear case of non-student speech, but did not clearly distinguish the example from the facts of this case. Had Frederick driven with the bumper sticker on his car at the same location as where he unfurled his banner, his display of the message on his bumper sticker would almost undisputedly not fall under the category of student-speech subject to school officials' discipline.

Petitioners assert that the event had the special characteristics of the school environment based on two theories. The first is that this was a "school social event" similar to a school field trip. The second is that Frederick's speech had the imprimatur of school. Neither theory withstands scrutiny.

1. The Event Was Not a School Field Trip or Sponsored Activity.

The fact pattern in which student-speech cases typically arise occurs on school grounds – whether in the classroom,

the library, or anywhere else inside the schoolhouse gate. Under certain circumstances, *amici curiae* agree with Petitioners that certain well-established school events, such as field trips, may warrant the expansion of the definition of "on-campus speech," allowing schools to exercise their authority even outside the school's gate. But this "was not a fieldtrip, as no fieldtrip form had to be filled, and parental consent was not required." J.A. 38. Rather, this was the Olympic Torch Relay, "an event sponsored by the U.S. Olympic Committee, the Coca-Cola Company, and Chevrolet, and their local affiliates." J.A. 9 (Complaint ¶ 9).

To be sure, school "is not merely a plot of land. Numerous sporting events, drama productions, and debates are conducted off the premises of the school, but are nevertheless school activities. When the [school's] physical education class runs on [the street] because there is no athletic field at the school, students are still in school and still under the authority of their teachers and administrators." Pet. App. 63a.

But in these off-campus school-sponsored events, some, if not all, of the special characteristics of the school setting still exist. *Amici* submit that the following are among the special characteristics that might subject off-campus events to school discipline: (1) students are required to participate in the event whenever the event occurs during class hours; (2) students participate together as a group or class; (3) the activity is designed solely or primarily for students, and non-students are typically not allowed to become a part of the group; (4) an accompanying teacher is visibly present at all times, actively supervising the group, often with the help of additional accompanying adults (whether school personnel or not); (5) the event is part of a curricular activity that expands on topics taught in class (or, in the case of the physical education class, the off-campus activities cover a significant amount of what is being taught); (6) parental

permission may be required; (7) the activities lead to a situation which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); and (8) the school allocates funds for the event. Trivializing the need to show these special circumstances runs the risk of over-extending schools' authority and constraining First Amendment protection.

In this case, the record supports the existence of few, if any, of these characteristics. On January 24, 2002, the teachers in Juneau High School released their students to watch the Olympic Torch Relay, "but we did not have to stay together or stay with the teacher," as one student testified. J.A. 34. Indeed, "the teacher made no effort to keep those of us who did go out [to watch the Relay] together." J.A. 40. "We were not required to stay together as a class. . . . We were just told to come back to our next class at a particular time." J.A. 38. "Many people got bored and left. The school administrators weren't stopping any of the people who left." J.A. 40. "The area outside the school was crowded and chaotic. . . . I noticed a few other students did not come back to class after the relay was over, and the teacher noticed their absence but they didn't get into trouble." J.A. 34.

As a result, when Frederick reached Glacier Avenue in front of the school, "there were a lot of people [there], including both students and non-students, on both sides of the street." J.A. 30. Students and non-students commingled freely. The group of people standing around Frederick contained at least one adult non-student, J.A. 30, named Eli Geil. J.A. 37, 38. Indeed, the teachers themselves admitted that they "did not insist that . . . students remain together as a group," J.A. 51, 53, 55. Thus the first, second and third "special characteristics" of the school-limiting environment – mandatory participation during class hours, students

grouped together as a class, and activity designed primarily for students and disallowing non-students as part of the group – are absent here.

Similarly, the fourth characteristic – the requirement of active supervision of the school's grouped-together class by a visible school official – is missing as well. Underscoring that school officials did not supervise or have any control over students at the event is the fact that several students threw snowballs and *beverage bottles* at one another before Frederick displayed his banner: "several snowball fights broke out," and "students started throwing [] Coke bottles at each other." J.A. 30. In fact, "a lot of the bottles were thrown back and forth." J.A. 34. And although "some school officials tr[ied] to stop the[] [fight]," they didn't have "much luck." J.A. 30. The court below found that "the uncontradicted evidence is that it [the fight] had nothing to do with Frederick and his fellow sign-holders." Pet. App. 2a. But surprisingly, the record lacks any indication that the snowball and bottle throwing incident was further investigated or that involved students were disciplined. If this was indeed a school-sponsored event, then clearly acts of violence would not have been tolerated. The record evidence findings – of unruly behavior during the event, of many student leaving, and of a general chaos with an absence of any substantial teachers' reaction – all point to the conclusion of lack of an effective and visible supervision by the school.

As for the fifth characteristic – the off-campus activity should involve an expansion of an on-campus subject – it, too, can hardly be said to exist here. Although Petitioners claim that the event had a "noteworthy educational value," Pet. Brief at 3 – implicitly comparing it to a trip to the planetarium as part of the curriculum of a science class – there is no evidence to support that it was part of the school curriculum. Quite to the contrary, other than allowing

students to view it, the relay was never mentioned in class. As one student testified, "[n]o one discussed the Olympic relay or the Olympics, including teachers, so I could not see any way in which the event would be considered an educational or school-related event. There were no assignments related to the Olympics that I ever heard of, and no discussions of it." J.A. 37; *see also* J.A. 39 (testimony by another student) ("I'm not aware of any discussion that any class held about the relay itself or the Olympics.").

With respect to the sixth and eighth characteristics – requiring parental permissions and school-allocated funds, respectively – both are absent here as well. First, as noted earlier, "parental consent was not required." J.A. 38. Second, that the school district had allocated funds to transport students from schools not along the relay route, Pet. Brief at 3, may bear significance to those schools that used those funds, but JDHS was not among them. The high school never transported any students to see the relay, nor did it allocate funds for the event in any other way.[4]

Under these facts, the court of appeals was correct in its recognition that "supervision of most students was minimal or nonexistent." Pet. App. 5a. But the court of appeals erred in concluding that the school's hypothetical ability to supervise students, even though in reality it chose not to do so, is sufficient to categorize this as a school event. The test that the court should have used was much wider, and should have considered whether all of the enumerated special characteristics actually exist in this case such that school officials could exert authority over the students.

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[4] The seventh characteristic – the requirement that the activity would be "reasonably perceive[d] to bear the imprimatur of the school" – is noticeably missing from this case as well. *See infra*, at 14-17.

Schools cannot hold the stick at both ends. Had the principal intended this to be a school-sponsored event, as she is claiming it to be, she could have required all students to remain on school property. In fact, "[m]any students chose to view the relay from vantage points on campus because the campus is higher than street level and enabled them to see over the heads of students standing on the sidewalk." J.A. 24. The principal instead elected to release the students to the public streets, and elected not to have them organized in groups with their teachers. By doing so, the principal essentially created a "free period." It should come as no surprise to school administrators that when they choose to create a free period in which students leave campus, school officials will not be permitted to exercise the same level of control over the Constitutional rights of the students as they do when they are in the classroom or on school premises.

At a minimum, the record provides insufficient evidence to conclude that Frederick was subject to the discipline of school officials. The summary judgment record contains no evidence concerning how many students remained in or left the area of the school; how many students came back to school at the time they were directed to return; how far from the school students wandered to watch the relay; how many members of the public or non-students were in front of the school commingling with the high school students; how many teachers and administrators were outside "interspersed" among the students; and what instructions, if any, teachers were given before the relay. At the very least, therefore, this Court should direct the district court to further develop the record.

2. The Banner Did Not Bear the Imprimatur of the School.

Petitioners present as an alternative the theory that Frederick's speech bore the imprimatur of school, and the

school therefore acquired disciplinary jurisdiction over it. But Frederick's location across the road from the high school, as would be seen by the television cameras and as can be seen in the picture showing the banner, *see* Pet. Cert. 70a, had private houses as a backdrop, not the school.

Occurrences at the public relay event could not have been viewed as having the imprimatur of the high school, as the event was organized by private sponsors with the support of public officials, and was not associated with the high school in any way. According to Petitioners themselves, Pet. Br. at 2-3, there was significant preparation in Juneau, Alaska. "This is a unifying force for the state, especially with the Legislature here and in session. This is an Alaskan event, not just a Juneau event," said Juneau Mayor Sally Smith. *See* Charles Bingham, *The Olympic Torch Relay comes to Juneau*, JUNEAU EMPIRE, Jan. 16, 2002, *available at* http://www.juneauempire.com/stories/011602/spo_juneaurelay.shtml.

Petitioners state that "[f]our high school students, representing various segments of the student body, acted as torchbearers. J.A. 24." Pet. at 4. But Morse, in her affidavit, claimed that the students were simply "given permission to miss class to act as Torch-bearers." J.A. 24. The suggestion that the students were somehow selected by the school, or were selected to represent the school, is flatly false. In fact, the selection of torchbearers was entirely apart from school, and was at the complete discretion of the organizers of the Olympic games. In February 26, 2001, a press release was issued by The Salt Lake Organizing Committee for the Olympic Winter Games of 2002 (SLOC), The Coca-Cola Company and Chevrolet Motor Division asking Americans to propose, through a nomination process including a 50-to-100 word essay, inspirational people who should carry the Olympic Torch. Mitt Romney, President and CEO of SLOC, stated that: "Torchbearers will be people from all walks of

life who have inspired others, whether an individual or a community. As the Flame journeys throughout America, our intention is that it will serve as a catalyst, motivating individuals to strive for excellence and achievement in their lives, effecting positive change in their own communities." Utah Educ. Network, *Coca-Cola and Chevrolet Search for Inspirational Americans to Carry Olympic Torch* (Feb. 26, 2001), http://2002.uen.org/SLC2002/body-news-1.cgi?cat_id=11338&art_id=27156.

JDHS's only contribution was to permit the independently nominated high school students to miss class. The torchbearers did not "represent[] various segments of the student body," but rather appeared in their representative capacity as having inspired others within the public at large. Although Principal Morse may have believed that "[f]ailure to react to the display would appear to give the district's imprimatur to that message," Pet. App. 3a, that belief was unreasonable in light of the public nature of the event, and the unsupervised manner in which she permitted students to watch the event commingled with the public.

When considering whether speech is likely to bear the imprimatur of schools, this Court in similar contexts has ruled that there is no concern of the "imprimatur" of government sponsorship of religion by allowing religious groups to meet in school buildings after school hours. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). Certainly, then, the imprimatur of school cannot be found when the speech occurs off-campus but during school hours. The remote likelihood in certain situations that one might associate a student's speech with the school's speech when the speech was made off-campus clearly doesn't warrant the silencing of the student. As this Court has held, "[w]e think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory

basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of the Westside Comty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (citations omitted).

B. The Court Should Apply Full First Amendment Protections To Student Speech Occurring Outside The Schoolhouse Yard And Not Connected To A School Event.

For good reason, expression by students such as Respondent that was created and distributed or displayed off-campus enjoys full First Amendment protections. *See, e.g., Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45, 1050 (2d Cir. 1979) (*Tinker* not applied because underground newspaper not distributed at school; "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate"); *Shanley v. Ne. Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960 (5th Cir. 1972) (underground newspaper distributed outside school causing no disruption in school cannot be subject to school's disciplinary authority); *cf. Boucher v. Sch. Bd.*, 134 F.3d 821, 822, 827-29 (7th Cir. 1998) (*Tinker*'s material disruption standard applies because the article ("So You Want To Be A Hacker") was distributed on-campus and advocated on-campus activity).

This is in part because extending the authority of school officials outside school premises and beyond school-sponsored activities would risk infringing upon the authority of parents. When students are not in school, they are under the jurisdiction of their parents. It is a long-established right to raise one's children without unnecessary governmental interference. *See Wisconsin v. Yoder*, 406 U.S. 205, 232

(1972); *see also Shanley*, 462 F.2d at 964 ("It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts.").

Moreover, extending school officials' authority over student speech when the students are off campus risks extending school officials' authority over students in other respects as well. First Amendment rights are not the only constitutional rights of citizens that are somewhat curtailed within the school campus. The requirement of Due Process is severely limited for student suspensions of ten days or less to what this Court has termed "rudimentary" due process. *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975). In a similar manner, the rights against unreasonable searches and seizures is modified on-campus, substituting the requirement of probable cause or a warrant with a requirement of a "reasonable suspicion." The Court justified this as a balance between the "legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

Expanding the schools' jurisdiction outside of its gates would make free speech, as well as these other rights, "a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker*, 393 U.S. at 513. Without the safeguard of the "schoolhouse gate," there would be no limit to the reach of school jurisdiction. This cannot and must not be the scope of the Bill of Rights – only to protect what schools have deemed appropriate.

II. EVEN UNDER THIS COURT'S STUDENT-SPEECH PRECEDENTS, SCHOOL OFFICIALS DO NOT HAVE DISCRETION TO CENSOR ANY SPEECH THEY DEEM CONTRARY TO THE SCHOOL'S EDUCATIONAL MISSION.

If the Court determines that this case should be analyzed pursuant to its *Tinker-Fraser-Kuhlmeier* trilogy of school speech precedents, it should reject the Petitioners' and the Government's novel, far-reaching attempt to extend these precedents to permit school officials to prohibit any student speech that they deem "undermines" or "is inconsistent with" a school's "basic educational mission" or the school's own message. Pet. Br. at 22, 25; United States Br. at 14, 17. The proposed broad reading would invert on their head the baseline principles of this Court's precedents, swallowing up the fundamental rule articulated by the Court that "school officials do not possess absolute authority over their students" and that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Necessarily, school officials are afforded broad discretion to promote particular messages through their own speech or through regulation of student speech in school-sponsored fora. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) ("The question whether the First Amendment requires a school to tolerate particular student speech – the question we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). Under our system of government, such broad latitude with regard to official speech or school-sponsored student speech is the means by which students are taught to become responsible

and active citizens – not through censorship of discordant, non-school-sponsored messages of individual students.

Petitioners claim that students' Constitutional rights of free speech exist only if there is "no valid educational purpose" in restricting their speech. Pet. Br. at 19, and 25. This is a dangerous inversion of this Court's holdings. Contrary to the Petitioners' proposed baseline principle of school authority over student expression, under this Court's established decisions, school officials have the authority to restrict otherwise protected student speech due to the special settings of schools *only* when such speech falls into one of three narrowly carved out exceptions: (1) when, in the context of mandatory school events, the manner of speech is lewd, vulgar, indecent, or offensive, *Fraser*, 478 U.S. at 685; (2) in the context of school-sponsored or curricular activities, when disfavored student speech might be construed as official school speech because it "bear[s] the imprimatur of the school," *Kuhlmeier*, 484 U.S. at 271;[5] or (3) when the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," *Tinker*, 393 U.S. at 513. Respondent's speech does not fall into any of these categories.

A. The Court Should Reject Petitioners' and the Government's Broad Proposed Reading of *Fraser*.

In urging reversal of the decision below, Petitioners argue that the Ninth Circuit "embraced an unduly narrow reading of this Court's teachings with respect to the free speech

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[5] As was stated in Part I of this brief, *supra*, the Olympic torch relay was a privately sponsored public event of state-wide importance, not a school-sponsored event, and could not be perceived as bearing the imprimatur of the school. Accordingly, official censorship pursuant to *Kuhlmeier* was not authorized.

rights of public school students," Pet. Br. at 14, and that "the banner's ambiguous but obtrusive message fell comfortably within the ambit of *Fraser*'s focus on promoting appropriate norms of discourse and civility." *Id.* at 15. With this argument, Petitioners rely on *Fraser* as a catch-all standard, authorizing the censorship of any student speech that school administrators find objectionable or contrary to their sense of the school's educational mission. The Government, too, argues that *Fraser* and *Kuhlmeier* confirm "that a school can prohibit speech inconsistent with its basic educational mission," Gov. Br. at 14, or that "counteract[s], if not drown[s] out, the schools' anti-drug message, especially because of peer pressure," *id.* at 17.

Such an expansive interpretation, however, distorts the holding in *Fraser* and provides a license for indiscriminate censorship of student speech. As is now familiar, the Court in *Fraser* addressed the discrete question of whether the school violated the First Amendment rights of a student punished for delivering a speech at a school assembly during classroom hours that presented a program on self-government (and that the Court compared to a classroom) based on "an elaborate, graphic, and explicit sexual metaphor" considered to be "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance." *Fraser*, 478 U.S. at 678-79.

Addressing the school's authority to penalize the speech at issue in *Fraser*, the Court held that it was "appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education," *id.* at 685-86. Thus the Court concluded that a "high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685.

While *Fraser* clearly recognized that students' speech rights are restricted in certain school contexts and that school officials may disassociate the school from the manner of student speech in certain official settings, *Fraser* was a limited holding pertaining to the manner of speech – specifically lewd, vulgar, indecent, and "plainly offensive" speech – in the context of an official school activity. *See, e.g., id.* at 683 ("The determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board." (emphasis added).) While it can hardly be disputed that school officials should not have to "surrender control" to students in a curricular activity, *Fraser* was not a broad license to censor any student speech occurring without school sponsorship that could be considered "offensive," or that the school deems inconsistent with the fundamental values of education, however it defines them.

Disregard of the limited and context-specific nature of the *Fraser* holding would create a classic slippery slope on which no student speech would be safe from the risk of administrative censorship, rendering the First Amendment protections articulated in *Tinker* all but a nullity, both on-campus and off. Reading *Fraser* to allow schools to prohibit any message or form of expression that the school determines to be offensive to its own principles essentially creates the scenario the *Tinker* majority eschewed—confining student expression to those sentiments that are officially approved. *See Tinker*, 393 U.S. at 511. Thus Petitioners' and the Government's proposed expansive reading of *Fraser* is unsupportable. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (noting that a broad reading of *Fraser* "swallows up *Tinker*"), *petition for cert. filed*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595); *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1275 n.5 (11th Cir. 2000) (recognizing the strong arguments "that the

more flexible *Fraser* standard is limited to situations in which the speech is more likely to be perceived as bearing the imprimatur of the school.")

Rejecting such a broad reading of *Fraser*, the Second Circuit recently reversed the district court's ruling that would have barred a student from wearing a t-shirt that featured an image of President Bush along with images of drugs and alcohol to convey criticism of the President and his alleged past drug and alcohol use. *See Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), *petition for cert. filed*, No. 06-757 (Nov. 28, 2006). In so ruling, the Second Circuit explained:

> Dictionaries commonly define the word offensive as that which causes displeasure or resentment or is repugnant to accepted decency. We doubt the *Fraser* court's use of the term sweeps as broadly as this dictionary definition, and nothing in *Fraser* suggests that it does. But if it does, then the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency.

Id. at 327-28 (citation omitted).

A broad interpretation of *Fraser* would also effectively render the subsequent *Kuhlmeier* ruling superfluous, for there would have been no need for this Court to articulate the school's authority to censor school-sponsored student speech to advance a pedagogical concern if the school already had, under *Fraser*, boundless authority to regulate student speech it deemed to be inappropriate. This Court has never indicated that *Fraser* was meant to occupy the entire field of First Amendment law relating to students' speech rights in school, and has never cited *Fraser* in connection with the

notion that schools can punish "offensive" student speech that is not vulgar, obscene, or indecent. *See, e.g. Kuhlmeier,* 484 U.S. at 266-67 (citing *Fraser's* holding that schools need not tolerate "sexually explicit" speech that constituted "vulgarity," in the context of an official school assembly); *Denver Area Educ. Telecomms. v. FCC*, 518 U.S. 727, 775 n.2 (1996) (referring to *Fraser* as an "indecency" case); *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214-16 (3d Cir. 2001) (Alito, J.) (striking down as unconstitutionally broad a school anti-harassment policy that did not confine itself to "vulgar or lewd speech," school-sponsored speech, and speech that would likely lead to substantial disruption or interference with the work of the school or the rights of other students). If student speech rights were governed entirely by *Fraser*'s "offensive speech" language, restraint of student speech would have little limit.

As the Ninth Circuit soundly noted in its opinion below, "[t]here has to be some limit to the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (internal quotation omitted). Pet. App. 11a. This Court must be careful not to broaden deference to schools to make these kinds of decisions that clearly violate the First Amendment rights of students, if students are to have any rights at all.

B. Under *Tinker*, Frederick's Speech Is Protected.

Nor is it necessary to interpret *Fraser* broadly. The fear articulated by Justice Black's dissent in *Tinker* that the ruling would lead to "a new . . . era of permissiveness," *Tinker*, 393 U.S. at 518 (Black, J., dissenting), has not been historically supported. The *Tinker* standard accounts for the notion that student speech rights are not coterminous with those of

adults; students have free speech rights only up to the point at which their speech interferes with the educational process of the school, through a substantial and material disruption of school activities or violation of others' personal rights.

The limits on student speech under *Tinker* have proven not to be merely theoretical. Courts engaging in a straightforward application of *Tinker* have upheld school censorship where the speech at issue clearly threatened disruption of the educational process of the school. School discipline of student speech has commonly been affirmed under *Tinker* in the context of student displays of the Confederate flag in schools that have histories of racial conflict among the students. *See Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 489-90, 492-93 (D.S.C. 1997) (upholding school suspension of student wearing jacket bearing confederate flag, based on reasonable anticipation of disruption due to school's history of disorder resulting from display of the flag); *Melton v. Young*, 465 F.2d 1332, 1333-35 (6th Cir. 1972) (same); *see also West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1365-66 (10th Cir. 2000) (upholding prohibition of display of the Confederate flag based on past incidents at the school involving the flag); *cf. Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 538 (6th Cir. 2001) (reversing summary judgment in favor of school for punishment of student's display of Hank Williams, Jr. t-shirt picturing confederate flag, in part because the school did not demonstrate history of turmoil surrounding flag that would justify fear of disruption). Effective applications of the *Tinker* material disruption standard can be seen in a variety of other contexts as well.[6]

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[6] In *Heinkel v. School Board*, 194 F. App'x 604 (11th Cir. 2006), for example, the court struck down as facially unconstitutional a school board policy prohibiting all religious and political symbols as a *(cont'd)*

Although the *Tinker* standard is designed to allow schools the flexibility to discipline student speech that disrupts the educational process, it does not permit the censorship that occurred in this case. The record shows no indication that the school administrators anticipated any disruption due to Frederick's banner, or that Frederick was involved in any disruptive conduct. Although Petitioners make it appear as if Respondent had been throwing snowballs and beverage bottles, Pet. Br. at 4, "the uncontradicted evidence is that it had nothing to do with Frederick and his fellow sign-holders." Pet. App. 2a. The graffiti incidents cited, Pet. Br. at 6, even if resulting from Respondent's expression rather than from Petitioners' censorship, do not rise to the level of disruption that the Court in *Tinker* had envisioned. The armbands in *Tinker* "caused comments, warnings by other students" and that "a teacher of mathematics had his lesson period practically 'wrecked'." *Tinker*, 393 U.S. at 518 (Black, J., dissenting). However, such level of "disruption" was not sufficient, according to the majority in *Tinker*, which concluded that "[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work." *Id.* at 508. Such is the case here.

Moreover, Petitioners' claim that Frederick's banner "substantially interfered with a school-sanctioned activity,"

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content-based restriction unsupported by reasonable belief that all such expression would create substantial disruption in the schools. The court rejected, however, an as-applied challenge to the prohibition of distribution of abortion-related literature, where the factual record reflected a reasonable forecast of substantial disruption or material interference with school activities. *Id.* at 608-09. Similarly, in *Pinard v. Clatskanie School District*, 467 F.3d 755 (9th Cir. 2006), the court held under *Tinker* that students' petition and complaints against their basketball coach were protected speech, but refusal to board the bus and participate in a scheduled game was not protected because it substantially disrupted and materially interfered with the operation of the basketball program. *Id.* at 759.

Pet. Br. at 31, is a novel one that was not presented previously to the courts. Before the Ninth Circuit, Petitioners conceded that Frederick's speech was censored only because it conflicted with the school's "mission" of discouraging drug use, not because Principal Morse was reasonably concerned about the likelihood of substantial disruption to the school. Pet. App. 3a. The Petitioners' characterization of the banner in this Court as "an antisocial publicity stunt designed to draw attention away from an important (and historic) school activity" does nothing to establish a reasonable basis for censorship under *Tinker*. Pet. Br. at 25. Petitioners' justification, that the message was "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle," demonstrates that the conflict between Frederick and the school is a purely ideological one. The record does not support a different justification, and *Tinker* clearly does not sanction school discipline in such a situation.

In a second attempt to show that the school's censorship was justified under *Tinker*, the Government attempts to distinguish *Tinker* on the ground that "[u]nlike respondent's banner, Tinker's armband protesting the Vietnam War did not advocate illegal conduct, and did not address a topic central to a school's basic educational mission." Gov. Br. at 7. Notwithstanding the fact that Respondent's message is an issue under dispute, Pet. App. 4a,[7] this distinction does not hold up to historical review.

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[7] The Respondent testified that his intent was to make a point about *freedom of speech*, rather than drugs. In his deposition testimony, for example, Frederick explained his banner as follows: "Q: And what was the message that you were trying to communicate to the national TV audience? A: That free speech is free speech. As long as you are not threatening someone or harassing someone, you can say what you want." J.A. 70-71. *See also* J.A. 29 ("We were not

(cont'd)

Not unlike the school board of Juneau, the school board in *Tinker* justified its response to the armbands based on the highly provocative nature of their expression, given that the Vietnam War was such an inflammatory issue, and that as such the armbands were likely to disrupt the school environment and its educational mission. *See* Brief for Respondent at 19-20, 21, *Tinker*, 393 U.S. 503. In 1968, the armband protest may well have been viewed as advocating illegal conduct (*e.g.*, draft-dodging, interference with military recruitment, or other types of civil disobedience), and the school board may well have defined its educational mission, in part, as the creation of loyal and patriotic citizens who would not openly protest war in a defiant manner. Certainly, support of the civil rights movement in the same historical period would likely have involved advocacy of illegal conduct (*e.g.*, sit-ins, marches without permits, "trespassing" at segregated lunch counters). Practically speaking, there are very few types of student speech against which a school board could not, with a little creativity, define as contrary to its "basic educational mission."

C. That Frederick's Speech May Have Advocated Illegal Drug Use Does Not Alter The First Amendment Analysis.

The result reached by the Ninth Circuit in this case is both correct according to the demands of the First Amendment and consistent with the demands of education policy. Petitioners belabor the point that schools have a role to play in preventing drug use by minors, citing the Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §§ 7101 *et*

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> trying to deliver a religious message or any message related to drug use.... It was a parody, an attempt to be funny. We were not advocating anything. *We thought we had a free speech right to display a humorous saying, and that's all we were doing.*") (emphasis added).

seq. ("SDFSCA"). *See* Pet. Br. at 26-28. This is of course true, but it is immaterial. Nowhere does the SDFSCA require that schools prohibit or otherwise limit student speech having to do with drugs, and in fact, to the extent the statute implicates speech at all, its emphasis rests squarely on the promotion of speech and other forms of disseminating information on the subject. *See* 20 U.S.C. § 7115(b).

This case is about schools' reactions to students' speech. Shutting down student expression is not an effective response; under the First Amendment, it is not a permissible response. As Justice Brandeis wrote: "Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds sub nom. Bradenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, teachers who hear or observe student speech or expression that they find inappropriate or offensive are not required to ignore the speech until it provokes some kind of significant disturbance in the school. In situations in which a student presents provocative expression, teachers can and should do what they are trained to do: make a lesson out of it. Practically speaking, a teacher may speak with the student and ask what the purpose of the message is, why the student feels compelled to share the message, and whether the student really thinks it is an appropriate message to put forth in the context of school; the school may even choose to lead a formal assembly on the issue.

It is a fundamental principle of First Amendment jurisprudence that the best antidote to objectionable speech is more speech, and this principle is no less salient in the

context of a public school. Indeed, the school setting is an especially fitting environment for exactly the kind of open discourse and debate that is meant to be fostered by the First Amendment. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

CONCLUSION

The NCAC and ABFFE as *amici curiae* respectfully request that this Court affirm the decision of the court below which vacated and remanded the district court's grant of summary judgment in favor of school officials.

Respectfully submitted,

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